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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL A. KIRKORIAN, Defendant and Appellant.	B207867 (Los Angeles County Super. Ct. No. TA089338)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Judge. Affirmed.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Michael A. Kirkorian appeals from a judgment entered after a jury convicted him of one count of second degree murder (Pen. Code, § 187, subd. (a)) and found true the allegation that he personally used and intentionally discharged a firearm that caused great bodily injury and death (Pen. Code, § 12022.53, subds. (b)-(d)). The trial court sentenced appellant to a term of 40 years to life in prison, consisting of 15 years to life for the murder, plus 25 years to life for the firearm enhancements. We affirm.

CONTENTIONS

Appellant contends: (1) the admission of preliminary hearing testimony of Dana Johnson (Johnson) denied appellant his constitutional right to confront witnesses; (2) the trial court erroneously limited appellant's cross-examination; (3) the trial court erroneously excluded evidence relevant to bias; (4) the trial court erroneously failed to instruct on the lesser included offense of voluntary manslaughter; (5) the trial court coerced the jury's verdict; and (6) the cumulative effect of the multiple errors prejudiced appellant's right to a fair trial.

FACTS AND PROCEDURAL BACKGROUND

On February 11, 2007, Damon Pugh (Pugh) took Johnson, an 18-year-old prostitute, to a party for Regina Sanford (Regina) in Compton. Pugh's friend appellant also attended the party. Pugh's cousin Corey Wilson (Wilson) was also present. Pugh's wife, Kewanna Gilliam (Gilliam), from whom he was separated, arrived a few hours after Pugh. Gilliam was with a friend and several family members, including Antoinette Itric (Itric), Kimberly Nick (Nick), Rodney Smith (Rodney) and Rodney's brother Rondel Smith (Rondel).

Sometime after 1:00 a.m., Pugh and Gilliam began arguing about Johnson. Pugh decided to leave with Johnson and asked Wilson and appellant to walk them to his car. Gilliam and her friends and family surrounded Pugh, yelling at him. When Johnson got in the car, Gilliam and her companions broke the antenna and tried to break the car window to reach her. A fight broke out between Rondel and appellant and between Rodney and Wilson. Rondel hit appellant in the back of the head with a bat, in what

Pugh described as a "sucker punch," and ran away. Appellant fell to the ground, then grabbed a gun out of the back seat of a car. He ran after Rondel and shot him. Rondel collapsed. Appellant stood over him and continued to shoot him. Appellant then drove away.

Rondel was shot seven times and died from his wounds. Johnson testified at the preliminary hearing that she saw appellant shoot Rondel. Johnson failed to show up for a prearranged meeting prior to trial and for trial despite the People's attempts to locate her. The trial court determined that she was an unavailable witness and permitted the People to introduce her preliminary hearing testimony at trial. Nick identified appellant as the shooter from a photographic lineup and at trial. Pugh identified appellant as the shooter to detectives and at the preliminary hearing. At trial, however, Pugh testified that he did not see the shooter. He also testified that he had been threatened before and on the day of trial. Tianie Sanford (Tianie), Regina's sister, also attended the party. She testified that she was Rondel's girlfriend and that she saw appellant grab a gun out of the back seat of a car and chase Rondel. She then heard gunshots.

DISCUSSION

I. The trial court properly admitted Johnson's preliminary hearing testimony

Appellant contends that the trial court erred in finding that the People had exercised due diligence in attempting to secure Johnson's presence at trial and that the admission of Johnson's prior testimony denied appellant his right to confront witnesses under the state and federal constitutions. We disagree.

Evidence Code section 1291, subdivision (a)(2) provides that evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Among other things, a witness is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence

but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

"[T]he term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include '"whether the search was timely begun"' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*People v. Cromer* (2001) 24 Cal.4th at 889, 904.)

"[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*People v. Cromer, supra*, 24 Cal.4th at p. 901.)

Our independent review persuades us that the People exercised due diligence in attempting to locate Johnson. Los Angeles County Sheriff's Department Detective Kent Wegener (Detective Wegener) testified that he had interviewed Johnson as a witness to the shooting. At the preliminary hearing on July 31, 2007, Johnson testified that appellant was the shooter. While appellant complains that the People did not monitor Johnson's whereabouts after the July 31, 2007, preliminary hearing, and only attempted to locate her four days before the case was sent out to trial, the People are under no duty to keep periodic tabs on every material witness in a criminal case. (*People v. Hovey* (1988) 44 Cal.3d 543, 564 [the People have no obligation to keep tabs on every material witness due to prohibitive administrative burden and difficulty of controlling witness who plans to leave state long before trial date is set].) Here, Detective Wegener testified that Johnson had been cooperative and agreed to come to court at least up to November 17, 2007. On December 14, 2007, four days before jury selection was scheduled to begin, Detective Wegener spoke to Johnson, who reluctantly agreed to meet with him and to testify at trial. When Johnson failed to show for the meeting, Detective Wegener immediately attempted to locate her. He called her on her cell phone, which was the only phone number he had, and repeatedly left messages, which she did not return. At one

point a woman answered the phone and said that the phone belonged to her and not Johnson and that Johnson did not want to go to court. Detective Wegener believed that Johnson had answered the phone but wanted to evade him. Detective Wegener testified that his attempt to find another phone number for Johnson by searching the databases available to him was futile. His search for another address only revealed a previous address that he knew she had not resided at since the murder. He also spoke to a man with whom Johnson had previously lived. The man said Johnson did not live with him anymore and he had no way of getting in touch with her. He visited the house of Johnson's best friend, who said she had no way of getting in touch with Johnson. He also investigated Johnson's advertisements for her services on Craigslist and found that she had removed her listings around December 19th or 20th. He testified that to his knowledge Johnson was not in a morgue or hospital or in custody.

Appellant contends that Detective Wegener gave vague responses as to the number of messages he left and the databases he searched. Appellant complains that the detective did not explain why he did not attempt to locate Johnson by visiting skid row or the recovery home where she had been living in March. But, "[t]hat additional efforts might have been made or other lines of inquiry pursued" does not affect the conclusion that the People exercised due diligence by using reasonable efforts to locate the witness. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

We conclude that the trial court did not err in finding that the People exercised due diligence in attempting to locate Johnson. Therefore, the admission of her preliminary hearing testimony was not error. In any event, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Nick testified at trial that appellant shot Rondel. In his recorded police interview and at the preliminary hearing, Pugh testified that appellant shot Rondel. Also, Tianie testified that she saw appellant grab a gun out of a car and chase Rondel. She then heard gunshots. Despite appellant's attempts to have us reweigh the evidence and the credibility of the witnesses, which we cannot do, we conclude that there is no reasonable doubt that a jury would have found appellant guilty even in the absence of Johnson's preliminary hearing testimony.

II. The trial court did not abuse its discretion in excluding hearsay statements made by Johnson to Detective Wegener

Appellant next contends that the trial court erred by excluding hearsay statements made by Johnson to Detective Wegener that defense counsel sought to admit in order to impeach Johnson's testimony. Appellant claims the evidence was admissible under Evidence Code section 1202 and that the trial court curtailed his constitutional rights to confront witnesses and present relevant evidence by limiting his cross-examination of Detective Wegener.

We first note that appellant forfeited his claim that the challenged evidence was admissible under Evidence Code section 1202 by failing to raise it before the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) In any event, we conclude that Evidence Code section 1202 does not apply.

Pursuant to Evidence Code section 1202, "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." Thus, under Evidence Code section 1202, when a hearsay *statement* by a declarant who is not a witness is admitted into evidence by the prosecution, an inconsistent hearsay statement by the same person offered by the defense is admissible to attack the declarant's credibility. (*People v. Corella* (2004) 122 Cal.App.4th 461, 470.)

Evidence Code section 1202, however, does not apply to the impeachment of a witness who has testified. (*People v. Williams* (1976) 16 Cal.3d 663, 668, superseded by statute on other grounds as stated in *People v. Martinez* (2003) 113, Cal.App.4th 400, 408 [Evid. Code § 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified].)

Here, Johnson does not qualify as a hearsay declarant under Evidence Code section 1202. Rather, she was an in-court witness, and no hearsay statement by her had been received in evidence as hearsay evidence through her testimony or that of another

witness. Johnson testified at the preliminary hearing that from inside the car she saw appellant shoot Rondel. At the preliminary hearing, Johnson was cross-examined but never testified about any statements she made to police. Nor did Detective Wegener testify on direct examination about any discussions that he had with Johnson or any statements she made. Only on cross-examination did Detective Wegener testify that he interviewed Johnson one time on March 1, 2007, three weeks after the shooting. The trial court then properly sustained several hearsay objections raised by the People to a series of questions regarding statements made to Detective Wegener by Johnson, including questions about Johnson's statements concerning her relationship with Pugh, her statements about seeing people carrying liquor into the party, and her statements about hearing the shots.

We conclude that the trial court did not abuse its discretion in excluding hearsay statements made by Johnson to Detective Wegener.

III. The trial court did not abuse its discretion in sustaining the People's objections to defense counsel's questions to witnesses regarding gang membership of other witnesses or relatives

Appellant contends that the trial court improperly excluded evidence relevant to bias on the part of prosecution witnesses. We disagree.

Only relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. (*People v. Williams* (2008) 43 Cal.4th 584, 633-634.) The trial court retains broad discretion in determining the relevance of evidence. (*Ibid.*) The existence or nonexistence of a bias, interest, or other motive on the part of a witness ordinarily is relevant to the truthfulness of the witness's testimony. (Evid. Code, § 780, subd. (f).)

Appellant contends that he was entitled to question the witnesses about their membership in a rival gang because it was relevant to bias and to the defense theory that

witnesses who identified appellant as the shooter were members of the Blood gang trying to incriminate appellant, who was a rival Crip gang member. But, the evidence showed that the witnesses were not active gang members. Contrary to appellant's claim on appeal, Pugh did not testify that he was a member of the Blood gang. He stated that at one time he had been a gang member but he had not been active for the past four years. On cross-examination, Pugh denied that there was any gang connection to the killing. He testified that the party was not hosted by Bloods and that no Piru gang members were present. He also testified that appellant was a Crip and also his friend, undermining the inference of gang rivalry between the two. The trial court thus properly sustained a foundation and relevance objection to defense counsel's questions to Pugh as to whether Rondel was a Piru and Rodney was a gang member. Similarly, the trial court also properly sustained relevance objections to defense questions to Nick as to whether Pugh had any relationship to a gang after she testified that neither she nor any of her relatives were gang members. The trial court also properly sustained relevance and speculation objections to defense counsel's question to Itric if she knew whether any of her relatives belonged to gangs and to Tianie if she knew whether the shooting occurred in a Piru neighborhood. These wide-ranging questions regarding unidentified nonwitnesses were simply attempts to introduce gang affiliation in support of appellant's unsubstantiated theory of a gang collusion against him.

Furthermore, the trial court did not abuse its discretion in denying appellant's motion for new trial, reiterating that the killing did not have any connection to gang activity, and that the idea that gang members would devise a scheme to blame appellant in court was a "fiction."

We conclude that the trial court did not abuse its discretion in sustaining objections to defense counsel's questions on the basis of relevance and therefore did not deny appellant his constitutional rights to present a defense and confront witnesses.

IV. Appellant was not entitled to a voluntary manslaughter instruction

Appellant next contends that substantial evidence supported an instruction on voluntary manslaughter on the theory that appellant killed Rondel in the heat of passion. We disagree.

The People urge that appellant is precluded from complaining about the trial court's failure to instruct on voluntary manslaughter because his trial counsel made a tactical decision not to request the instructions. "Invited error, however, will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Valdez* (2004) 32 Cal. 4th 73, 115.) In *People v. Valdez, supra,* 32 Cal.4th at page 115, our Supreme Court held there was no finding of invited error where defense counsel, after consulting with the defendant, told the trial court he did not want to request any lessers because it was unclear as to whether defense counsel was referring solely to voluntary and involuntary manslaughter instructions or instructions on all potential lesser included offenses. The court held that defense counsel's statement that "they did 'not want to request any lessers,'" was not invited error because counsel did not express a deliberate tactical purpose. (*Ibid*.) The court concluded, nonetheless, that the trial court did not err in failing to instruct the jury sua sponte on second degree murder because "'[s]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense.'" (*Id*. at p. 116.)

Similarly, here, defense counsel merely stated that she did not want to request any lessers, without explaining her tactical purpose. We conclude, nonetheless, that the trial court did not err in failing to instruct the jury sua sponte on heat of passion voluntary manslaughter. A trial court must instruct sua sponte on a lesser included offense only if there is substantial evidence to support a jury's determination that the defendant was in fact only guilty of the lesser offense. (*People v. Williams* (1997) 16 Cal.4th 153, 227.) "'[N]either heat of passion nor imperfect self-defense is an element of voluntary manslaughter' that must be affirmatively proven. [Citation.] Rather, they are 'theories of partial exculpation' that reduce murder to manslaughter by negating the element of

malice. [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.] [¶] '"To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" [Citation.]' [Citation.] '[T]he factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]' [Citation.] [¶] To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.] '"However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . ."'" (*People v. Moye, supra,* at pp. 549-550.)

In *People v. Moye, supra,* 47 Cal.4th at pages 540 to 541, our Supreme Court held that the trial court did not err by instructing on reasonable and unreasonable self-defense voluntary manslaughter, but refusing to instruct on heat of passion voluntary manslaughter. In that case, the defendant testified that after a fight with the victim the previous night, he met up with the victim, who kicked his car. He chased the victim, who had a bat and managed to grab the bat after the victim hit him on his arms and hands. He claimed he met each advance of the victim with a defensive swing of the bat until the victim fell to the ground and could attack him no longer. (*Id.* at p. 552.) The court held

that no reasonable juror could conclude that the defendant acted rashly or without due deliberation and reflection, and from this passion rather than from judgment, in light of the defendant's testimony he acted deliberately in seeking to defend himself from each successive advance by the victim. (*Id*. at pp. 553-555.) Our Supreme Court has also held that the defense of manslaughter is unavailable to a defendant who engages in mutual combat but takes undue advantage by using a deadly weapon. (*People v. Lee* (1999) 20 Cal.4th 47, 60, fn. 6.) The passion that reduces a killing to manslaughter is not necessarily fear and can never be revenge. (*People v. Valentine* (1946) 28 Cal.2d 121, 139; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 ["the desire for revenge does not qualify as a passion that will reduce a killing to manslaughter"].)

The burden to set forth sufficient evidence of heat of passion rests with the defendant. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) Our examination of the record shows that there was not substantial evidence to support an instruction on voluntary manslaughter. The evidence showed that during the course of mutual combat, Rondel hit appellant in the back of the head with a bat. Appellant fell to the ground. Rondel then attempted to flee. Apparently, appellant was not seriously hurt. Instead of abandoning the fight when his opponent fled or chasing him to continue to engage in the fistfight as an ordinary reasonable person would have, appellant took time to retrieve a deadly weapon from a car. Achieving an undue advantage, he then pursued Rondel in an act of revenge. Appellant shot Rondel as he chased him. After Rondel collapsed, appellant shot him repeatedly. There is no independent evidence that appellant killed in the heat of passion. Because appellant did not testify, there is no evidence to support an inference that he subjectively harbored such strong passion or acted rashly or impulsively while under its influence.

Appellant's further argument that the trial court's failure to instruct on heat of passion or removed an element of murder from the jury's consideration and resulted in an incomplete definition of malice must also fail. He contends that "[w]hen the People's evidence suggests that the killing was provoked and committed in the heat of passion, the

People must prove the absence of provocation in order to prove the malice element of murder." But, appellant did not request clarifying instructions. (*People v. Johnson* (1993) 6 Cal.4th 1, 52, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879.) And, as previously discussed, the evidence does not support the inference that the killing was committed in the heat of passion.

We conclude the trial court did not err in failing to instruct the jury on the lesser included instruction of heat of passion voluntary manslaughter.

V. The trial court did not coerce the jury's verdict

Appellant contends that the trial court improperly coerced the jury's verdict by sending the jury back to deliberate after learning that the jurors were divided and could not reach a verdict. We disagree.

Pursuant to Penal Code section 1140, "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." The determination of whether there is a reasonable probability of agreement rests in the sound discretion of the trial court. (*People v. Proctor* (1992) 4 Cal.4th 499, 539.) Thus, "Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived '"as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered." [Citations.]'" In discharge of its statutory responsibility of assuring that a verdict is rendered unless there is no possibility of agreement, the trial court may inquire into the jury's numerical division. (*Proctor*, at p. 538.)

Here, the record shows that the jury deliberated for a total of six hours 45 minutes over three days before informing the trial court that it was unable to reach a verdict. The

jury had submitted several questions on the second day, and on the third day, testimony was read back to the jury. After reconvening from the lunch break, the jury announced that it could not reach a decision. Our review of the record reveals that the trial court did not coerce the jury. The trial court asked if there was anything the court could do to assist the jury and ascertained that the vote was split 10 to 2. The trial court noted that the jury had not deliberated that long, and "[t]his is not the kind of case you make a decision in [an] hour or two or five hours." When the trial court asked if there was anything it could do to assist them, Juror No. 1 suggested, and the rest agreed, with the exception of Juror No. 12, that they could deliberate a bit longer. In what may have been an attempt at humor, Juror No. 12 first stated, "No, we'll be here for another couple months," then immediately stated, "Yes, your Honor." In a similar vein, the trial court responded, "Okay. So we'll be here another couple months." The jury deliberated for two more hours that day, heard requested read-back of testimony the next day, and reached a verdict 10 minutes after resuming deliberations.

The trial court's remarks were neutral. It did not express an opinion, imply that there was anything wrong with the jurors' initial inability to reach a verdict, or badger the jury into reaching a verdict. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775 [trial court did not coerce jury, which informed trial court on four occasions that it was at an impasse, and trial court instructed it to continue its deliberations in long, complex trial where deliberations had been punctuated by reading of testimony].) Moreover, it is presumed that the jury understood and followed the instruction given that it could not consider anything the trial court said or did as an indication of what it thought about the facts, the witnesses, or what its verdict should be. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

We conclude that the trial court did not coerce the jury to reach a verdict. We also reject appellant's claim of cumulative error because the trial court simply did not commit all the errors of which appellant complains. Moreover, the evidence against appellant was overwhelming. Even if the claimed errors had occurred, it is not reasonably probable

that the jury would have reached a result more favorable to appellant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.